

Pali PTP Sdn Bhd v Bond M&E Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
 NOS W-02(C)(A)-314-02 OF 2021 AND W-02(C)(A)-399-02 OF 2021
 VAZEER ALAM MYDIN, ABU BAKAR JAIS AND LIM CHONG
 FONG JJCA
 1 SEPTEMBER 2023

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*Building and Construction Law — Construction Industry Payment and
 Adjudication Act 2012 ('CIPAA') — Payment dispute — Subcontractor ('S')
 obtained adjudication decision ('AD') against main contractor ('M') for payment of
 adjudicated amount — M separately obtained AD against its employer ('E') for
 payment of another adjudicated amount in respect of same project — On M's
 failure to pay adjudicated amount, S served notice on E (as M's principal) under
 s 30 of the CIPAA requesting direct payment of its adjudicated amount —
 Whether E could not refuse to make the direct payment as S had fulfilled all
 conditions under s 30 CIPAA to obtain remedy — Whether S did not have to prove
 to E that it had not received payment from M as that was presumed when notice for
 direct payment was issued — Whether onus shifted to E to enquire from M on
 whether it had paid S — Whether High Court wrongly held 'adjudicated amount'
 in s 30 of the CIPAA did not include interest and costs awarded in AD — Whether
 purposive construction of phrase in light of purpose and object of the CIPAA showed
 that 'adjudicated amount' included interest and costs*

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Pali Ptp Sdn Bhd ('Pali') had appointed a company ('JEKS') as its main contractor to implement a building construction project. JEKS, in turn, had appointed Bond M&E Sdn Bhd ('Bond') as a nominated subcontractor to carry out a part of the project. Payment disputes between the parties in connection with the project resulted in adjudication proceedings being separately commenced under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') between Bond and JEKS, on the one hand, and between JEKS and Pali, on the other. The Bond-JEKS proceedings resulted in an adjudication decision ('AD') being made in Bond's favour which required JEKS to pay Bond a principal sum of RM3,387,425.44 together with various other amounts for interest and costs. The adjudication proceedings between JEKS and Pali, on the other hand, resulted in an AD in JEKS' favour requiring Pali to pay JEKS an adjudicated sum of RM8,512,737.03. On Pali's application to the High Court, this adjudicated sum was reduced to RM3,368,919.69 and the court allowed the reduced sum together with interest and costs to be enforced by JEKS against Pali as if it was a judgment of the court under s 28 of the CIPAA. Meanwhile, since JEKS failed to pay Bond the sum that was adjudicated as between them, Bond issued a notice to Pali, as JEKS' principal, requesting it to make direct payment of the adjudicated

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A amount to Bond under s 30 of the CIPAA. Pali denied that it had any obligation to do so claiming that: (a) it did not owe any monies to JEKS at the material time; and (b) Bond had not proven that it had not received payment from JEKS. Bond applied to the High Court to order Pali to make the direct payment under s 30 of the CIPAA because it had complied with all the conditions under that section for the remedy of direct payment to be invoked. B The High Court agreed and ordered Pali to make the direct payment. The court, however, held that the phrase ‘adjudicated amount’ in ss 30(1) and (3) of the CIPAA did not include interest and costs but only referred to the principal sum of RM3,387,425.44. Pali’s appeal herein was against the decision ordering C it to make direct payment to Bond whilst Bond’s appeal herein was against the decision excluding interest and costs from the term ‘adjudicated amount’.

Held, unanimously dismissing Pali’s appeal and allowing Bond’s appeal:

- D (1) Contrary to Pali’s contention, there was no necessity for Bond to provide affirmative evidence that it had not been paid by JEKS. Based on s 30(1) and (2) of the CIPAA read together as a whole, the non-payment was presumed and Bond only had to assert the same in its notice of direct payment to Pali. The onus then shifted to Pali to enquire from JEKS as to whether Bond had been paid. Since Pali had failed to do so, the court concluded that Bond had not been paid by JEKS (see para 35).
- E (2) The court was satisfied from the evidence adduced that there were monies due and payable by Pali to JEKS at the material time based on the adjudication decision (‘AD’) in the proceedings between JEKS and Pali. F Hence, the adjudicated amount in the AD between JEKS and Bond, inclusive of the interest and costs that were awarded, had to be paid directly by Pali (as JEKS’ principal) to Bond under s 30 of the CIPAA (see paras 36–37).
- G (3) The High Court judge erred in construing the phrase ‘adjudicated amount’ in s 30 of the CIPAA to exclude interest and costs. Although the term ‘adjudicated amount’ was not defined in s 4 of the CIPAA, it had to be construed in the light of the purpose and object of the CIPAA which, among other things, was to protect and/or safeguard the rights of small H contractors and/or subcontractors. Such a purposive construction showed that the term included interest and costs. If the term ‘adjudicated amount’ did not include interest and costs, then the Bond would have to seek recovery twice — once against Pali for the principal amount awarded and then against JEKS separately for the interest and costs only. Such a I course of action could not have been contemplated by the Legislature (see paras 41, 43–44, 49 & 51).

[Bahasa Malaysia summary]

Pali Ptp Sdn Bhd ('Pali') telah melantik sebuah syarikat ('JEKS') sebagai kontraktor utamanya untuk melaksanakan projek pembinaan bangunan. JEKS kemudiannya melantik syarikat Bond M&E Sdn Bhd ('Bond') sebagai subkontraktor untuk melaksanakan sebahagian dari projek tersebut. Timbul pertikaian mengenai pembayaran antara pihak-pihak berkaitan dengan projek itu yang menjurus kepada prosiding penghakiman secara berasingan di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') antara Bond dan JEKS, di satu pihak, dan di antara JEKS dan Pali, di pihak yang lain. Penghakiman ('P') memihak kepada Bond di dalam prosiding Bond-JEKS yang memerintahkan JEKS membayar Bond jumlah prinsipal sebanyak RM3,387,425.44 dengan pelbagai jumlah lain untuk faedah dan kos. P memihak kepada JEKS di dalam prosiding adjudikasi antara JEKS dan Pali yang memerintahkan Pali membayar JEKS jumlah sebanyak RM8,512,737.03. Pali telah memohon ke Mahkamah Tinggi, dan jumlah adjudikasi dikurangkan kepada RM3,368,919.69 dan mahkamah membenarkan jumlah yang dikurangkan berserta faedah dan kos dikuatkuasakan oleh JEKS terhadap Pali seolah-olah ianya jumlah penghakiman Mahkamah menurut s 28 APAIP. Sementara itu, memandangkan JEKS gagal membayar jumlah adjudikasi Bond, Bond telah mengeluarkan notis kepada Pali, sebagai prinsipal JEKS, untuk tuntutan pembayaran jumlah adjudikasi kepada Bond menurut s 30 APAIP. Pali menafikan bahawa mereka mempunyai kewajipan untuk berbuat demikian atas alasan bahawa: (a) mereka tidak berhutang sebarang jumlah wang kepada JEKS pada setiap masa material; dan (b) Bond tidak membuktikan bahawa mereka tidak menerima bayaran daripada JEKS. Bond memohon kepada Mahkamah Tinggi untuk memerintahkan Pali membuat pembayaran terus menurut s 30 APAIP kerana mereka telah mematuhi semua syarat di bawah peruntukan itu untuk satu remedi pembayaran langsung. Mahkamah Tinggi bersetuju dan memerintahkan Pali membuat pembayaran terus tersebut. Walaubagaimanapun, mahkamah berpendapat frasa 'jumlah adjudikasi' dalam ss 30(1) dan (3) APAIP tidak termasuk faedah dan kos tetapi hanya merujuk kepada jumlah prinsipal sebanyak RM3,387,425.44. Rayuan Pali di sini adalah mengenai keputusan yang memerintahkannya membuat pembayaran terus kepada Bond manakala rayuan Bond di sini adalah terhadap keputusan bahawa pembayaran itu tidak termasuk faedah dan kos menurut tafsiran terma 'jumlah adjudikasi'.

Diputuskan, sebulat suara menolak rayuan Pali dan membenarkan rayuan Bond:

- (1) Berlawanan dengan hujahan Pali, tiada keperluan untuk Bond untuk mengemukakan keterangan yang meyakinkan untuk menunjukkan bahawa mereka tidak dibayar oleh JEKS. Menurut s 30(1) dan (2) APAIP yang dibaca secara keseluruhan, kegagalan pembayaran adalah satu

- A** anggapan dan Bond hanya perlu menyatakan anggapan tersebut di dalam notis pembayaran terus kepada Pali. Memandangkan Pali telah gagal membuat pembayaran, mahkamah telah memutuskan bahawa Bond tidak dibayar oleh Pali (lihat perenggan 35).
- B** (2) Mahkamah berpuas hati dengan keterangan yang dikemukakan bahawa terdapat wang yang tertunggak yang harus dibayar oleh Pali kepada JEKS pada setiap masa material menurut keputusan adjudikasi ('KA') antara JEKS dan Bond, termasuk jumlah faedah dan kos yang dibenarkan, yang harus dibayar secara terus oleh Pali (yang merupakan principal JEKS) kepada Bond menurut s 30 APAIP (lihat perenggan 36–37).
- C** (3) Hakim Mahkamah Tinggi terkhilaf ketika menafsirkan terma 'jumlah adjudikasi' di dalam s 30 APAIP dengan mengecualikan jumlah faedah dan kos. Walaupun istilah 'jumlah adjudikasi' tidak didefinisikan di dalam s 4 APAIP, ianya perlu ditafsirkan berdasarkan tujuan APAIP yang, antara lain, untuk melindungi hak kontraktor kecil dan/atau subkontraktor. Kaedah tafsiran secara tujuan menunjukkan bahawa terma itu termasuk faedah dan kos. Sekiranya terma 'jumlah adjudikasi' tidak termasuk faedah dan kos, maka Bond perlu mendapatkan remedi secara dua kali sekali terhadap Pali untuk jumlah prinsipal yang diberikan dan kemudian terhadap JEKS secara berasingan untuk faedah dan kos sahaja. Tindakan sedemikian tidak boleh dipertimbangkan oleh Badan Perundangan (lihat perenggan 41, 43–44, 49 & 51).]
- D**
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- F** **Cases referred to**
ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] 1 LNS 1522, CA (refd)
CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2019] MLJU 1215; [2020] 1 CLJ 75, CA (dstd)
- G** *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 1 LNS 187, HC (refd)
HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case [2021] 8 MLJ 347; [2020] 5 AMR 757, HC (refd)
- H** *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (refd)
Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1, FC (refd)
PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor [2020] MLJU 118; [2020] 1 LNS 130, HC (folld)
- I** *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (folld)

Legislation referred to

Arbitration Act 2005 s 8

Construction Industry Payment and Adjudication Act 2012 ss 4, 12(5), 15, 18, 18(1), 25(o), 28, 28(1), (2), 30, 30(1), (2), (3), (5), Part IV

Interpretation Acts 1948 and 1967 s 17A

Appeal from: *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58 (High Court, Kuala Lumpur)

Sivabalan Sankaran (with Leonard Raj and Elizabeth Eu) (Tan Swee Im, Siva & Partners) in Civil Appeal No W-02(C)(A)-314-02 of 2021 for the appellants.

Deepak Mahadevan (with Faeza Suraya bt Roselan and Lim Fang Ni) (Azmi Fadzly Maha & Sim) in Civil Appeal No W-02(C)(A)-399-02 of 2021 for the appellants.

Deepak Mahadevan (with Faeza Suraya bt Roselan and Lim Fang Ni) (Azmi Fadzly Maha & Sim) in Civil Appeal No W-02(C)(A)-314-02 of 2021 for the respondents.

Sivabalan Sankaran (with Leonard Raj and Elizabeth Eu) (Tan Swee Im, Siva & Partners) in Civil Appeal No W-02(C)(A)-399-02 of 2021 for the respondent.

Lim Chong Fong JCA:**INTRODUCTION**

[1] There are two related appeals before us which are as follows:

- (a) Civil Appeal No W-02(C)(A)-314-02 of 2021 ('Appeal 314'); and
 - (b) Civil Appeal No W-02(C)(A)-399-02 of 2021 ('Appeal 399')
- (collectively 'appeals').

[2] For convenience and clarity, the relevant parties in the appeals will be addressed as follows:

- (a) Pali PTP Sdn Bhd, the appellant in Appeal 314 and respondent in Appeal 399 — 'Bond'; and
- (b) Bond M&E Sdn Bhd, the respondent in Appeal 314 and appellant in Appeal 399 — 'Pali'.

[3] The appeals concerned emanated from Kuala Lumpur High Court Originating Summons No WA-24C-121-06 of 2020 ('OS 121') filed by Bond pursuant to s 30 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for an order that Pali, as the principal company to JEKS

- A Engineering Sdn Bhd ('JEKS'), pay directly to Bond the amount which is due and owing to Bond by JEKS pursuant to an adjudication decision dated 3 January 2020 ('adjudication decision').
- B [4] The learned High Court judge ('HCJ') on 27 January 2021 adjudged and ordered Pali to pay Bond the principal sum of RM3,387,425.44 (but excluded costs and interests awarded in the adjudication decision) as well as costs of RM10,000 in favour of Bond ('judgment').
- C [5] Consequently, Pali on 11 February 2021 lodged Appeal 314 against the judgment. Bond thereafter on 24 February 2021 lodged Appeal 399 against that part of the judgment which excluded costs and interests awarded in the adjudication decision from the 'adjudicated amount' pursued by Bond in its s 30 application under the CIPAA.
- D [6] We heard both appeals together on 9 December 2022 and have unanimously found that there is no merit in Appeal 314 which warranted our appellate intervention. Appeal 314 is therefore dismissed with costs of RM10,000 to Bond subject to allocator.
- E [7] Concurrently, we have unanimously allowed Appeal 399 with costs of RM10,000 to Bond subject to allocator by reason that the learned HCJ had erred in law in construing the phrase 'adjudicated amount' in s 30 of the CIPAA to mean only the principal claim sum awarded in the adjudication decision. We thus ordered that the judgment be varied in that the adjudicated amount comprising the principal sum of RM3,387,425.44 as well as both interest and costs awarded in the adjudication decision be paid directly from Pali to Bond as prayed in items (i), (ii), (iii), and (iv) of the notice of appeal dated 24 February 2021.
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- G [8] We now provide below the grounds of judgment.

THE BACKGROUND

- H [9] Bond is a private limited company incorporated in Malaysia with its business address at No 17, Jalan Angkasa Mas 5, Kawasan Perindustrian Tebrau II, 81100 Johor Bahru, Johor.
- I [10] Pali is also a private limited company incorporated in Malaysia with its business address at Jalan Tanjung A/6, Distripark A, Pelabuhan Tanjung Pelepas, 81560 Gelang Patah, Johor. Pali is the owner/employer of the project known as 'Cadangan Meroboh Dan Membina Semula Perindustrian Yang Mengandung: (i) 1 Unit Gudang Sesebuah 2 Tingkat Berserta Pejabat 3 Tingkat Dan Tempat Letak Kenderaan Berbumbung Di Aras Bumbung;

(ii) 2 Unit Pondok Pegawai; (iii) 1 Unit Pencawang Elektrik; (iv) 1 Unit Kebuk Sampah; (v) 1 Unit Rumah Pump; Dan (vi) 5 Unit Pondok Rehat Di Atas Lot DW1 & DW2 (Sebahagian PTD 2423), Jalan Tanjung A/2, Pelabuhan Tanjung Pelepas, Mukim Tanjung Kupang, Daerah Johor Bahru, Johor Darul Ta'zim' ('the project').

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[11] Pursuant to a letter of award dated 14 February 2017 ('LA'), Pali appointed JEKS which is a private limited company incorporated in Malaysia with its business address at C2-2F, Jalan Ampang Utama 1/1, Off Jalan Ampang, 68000 Ampang, Selangor Darul Ehsan as its main contractor for the project at the contract sum amounting to RM136,300,000.

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[12] Subsequently by a letter of acceptance dated 7 June 2017 ('subcontract'), JEKS appointed Bond as a nominated subcontractor for 'The Supply, Delivery, Installation, Testing, Commissioning, and Maintenance of the Proposed ACMV System & Electrical & Associated Installation works' ('works') in respect of the project.

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[13] In the course of the carrying out of the works, there were payment disputes that arose between the parties in connection with the project that resulted in CIPAA adjudication proceedings between Bond and JEKS as well as between JEKS and Pali.

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ADJUDICATION PROCEEDINGS BETWEEN BOND AND JEKS

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[14] On 22 July 2019, Bond issued its payment claim to JEKS for an outstanding sum of RM3,440,981.83 together with interest and costs under the subcontract. Subsequent thereto, Bond commenced adjudication proceedings under the CIPAA against JEKS via its notice of adjudication dated 21 August 2019 and Bond consequently obtained the adjudication decision against JEKS as follows:

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- (a) the sum of RM3,387,425.44, being the adjudicated amount;
- (b) the sum of RM42,404.08, being interest at the rate of 7.70%pa (Maybank base lending rate at 6.70% + 1%), calculated from the due date of each certificate (as claimed by the plaintiff) up to 22 July 2019 (date of the payment claim);
- (c) continuing interest at the rate of 7.70%pa (Maybank base lending rate at 6.70% + 1%) on RM3,390,881.44, calculated from 23 July 2019 to 3 September 2019;
- (d) continuing interest at the rate of 7.70%pa (Maybank base lending rate at 6.70% + 1%) on RM3,387,425.44, calculated from 4 September 2019 until full settlement; and

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- A (e) the sum of RM83,979.08, being the costs of the adjudication proceedings.

ADJUDICATION PROCEEDINGS BETWEEN JEKS AND PALI

- B [15] JEKS also commenced adjudication proceedings under the CIPAA against Pali under the LA and JEKS consequently obtained the adjudication decision on 25 November 2019 whereby the adjudicator allowed JEKS's claim against Pali for the amount of RM8,782,677.03. However on 13 January 2020, the adjudicator issued his corrected adjudication decision reducing the
C adjudicated sum from RM8,782,677.03 to RM8,512,737.03.

- D [16] Subsequently, JEKS filed Originating Summons No WA-24C-5-01 of 2020 at the High Court of Kuala Lumpur to enforce the adjudication decision under s 28 of the CIPAA. In response, Pali instituted Originating Summons No WA-24C-13-01 of 2020 to stay and set aside the adjudication decision under s 15 of the CIPAA. The High Court decided as follows on 9 November 2020:

- E (a) Pali's application to set aside the adjudication decision was allowed in part, where the sum of RM5,143,817.34 awarded by the adjudicator for variation works was set aside and JEKS was ordered to pay costs of RM18,000 to Pali subject to the allocatur;
- F (b) the remaining parts of the adjudication decision which were not set aside were allowed to be enforced as if it is a judgment or order of the High Court according to s 28 of the CIPAA vis Pali shall pay JEKS a sum of RM3,368,919.69 together with interest at the rate of 7.75%pa and 60% of the costs awarded in the adjudication proceedings amounting to RM60,929; and
- G (c) Pali's application to stay at the adjudication decision was dismissed with costs of RM5,000.

- H [17] As the result of having obtained the adjudication decision and JEKS failure to pay Bond accordingly, Bond issued a notice to Pali on 17 February 2020 pursuant to s 30(1) of the CIPAA requesting for direct payment ('notice of direct payment').

- I [18] However, Pali by way its solicitors' letter dated 7 April 2020 denied any obligation to make payment to Bond on the basis that there is no money due and owing by Pali to JEKS.

IN THE HIGH COURT

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[19] This has resulted in Bond instituting OS 121 in the High Court on 16 June 2020 pursuant to s 30 of the CIPAA against Pali to seek direct payment of the sum awarded in the adjudication decision.

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[20] Bond contended that it has satisfied the requirements of s 30 of the CIPAA that there is money due and owing by Pali to JEKS as evident by adjudication decision made pursuant to the adjudication proceeding between JEKS and Pali at the material time when Pali received the notice of direct payment.

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[21] Furthermore, Bond demonstrated that Pali failed to comply with s 30(2) of the CIPAA in that Pali did not serve a written notice to JEKS to request proof of payment made to Bond upon Pali's receipt of the notice of direct payment. According to Bond, this is fatal to the defence that there is no money due and owing by Pali to JEKS following *PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* [2020] MLJU 118; [2020] 1 LNS 130. In the absence of any proof of payment by JEKS to Bond, Pali must directly pay Bond the sums stipulated in the adjudication decision.

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[22] Bond also contended that s 30 of the CIPAA imposes a mandatory obligation on the principal/employer to make direct payment to the subcontractor once the conditions thereunder are fulfilled. Apart from referring to the long title of the CIPAA and Part IV therein on the 'Enforcement of adjudication decision', the Bond further referred to the Second and Third Readings of the Construction Industry Payment and Adjudication Bill 2011 on 2 April 2021 at pp 19, 21 and 26 and on 7 May 2012 at pp 94 and 95 in emphasising that the purpose of the CIPAA has always been to safeguard the interests of smaller contractors and not the employers or project owners by facilitating regular and timely payments and providing remedies for the recovery of payment by contractors and subcontractors.

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[23] In opposition, Pali denied that there is money due and payable by them to JEKS pursuant to s 30(5) of the CIPAA as the interpretation of that provision does not cover payments due under the adjudication decision between JEKS and Pali and ought to be limited to debts arising from the construction contract between them. It was further contended that Bond's corresponding right under s 30 of the CIPAA should only be exercised when there is a conclusive debt between the Pali and JEKS. According to Pali, there is no such debt due and payable because it is being seriously disputed by virtue of the ongoing arbitration proceedings between Pali and JEKS where Pali has claimed substantial set off against JEKS in the sum of RM22,537,672.88 not including the costs of rectification works. The arbitration is still ongoing at the

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A date of hearing of the Bond's application.

[24] Pali also contended that the court should not investigate into whether there is a bona fide debt owing by the defendant to JEKS in OS 121 as any interference by the court is not allowed under s 8 of the Arbitration Act 2005 and Pali will be prejudiced if the arbitration proceedings conclude that there is no debt due or payable to JEKS. On top of that, Pali also contended that s 30(1) and (3) of the CIPAA only allow for payment of the 'adjudicated amount' that does not include interest and costs as prayed by Bond in OS 121.

[25] The learned HCJ upon hearing the submissions of both parties held that Bond has fulfilled all the conditions to entitle it to invoke the remedy in s 30 of the CIPAA. The learned HCJ further held that the adjudication proceedings of Bond and JEKS as well as JEKS and Pali took place because of disputes over claims and counterclaims which arose out of the same chain of construction contracts executed by these parties in the project. There were monies found due or payable under the chain of construction contracts and this is fortified by the findings and conclusion of the adjudicator in the adjudication proceeding between JEKS and Pali. Hence, the learned HCJ concluded that Pali's contention that Bond is not entitled to seek recourse under s 30 of the CIPAA premised on the adjudication decision between JEKS and Pali because it is not derived from a construction contract is misconceived.

[26] Moreover, the learned HCJ held that Pali's fear of prejudice if the court allows Bond application in OS 121 and later, if the arbitrator should rule in Pali's favor, it will not be able to recover the money from Bond and/or JEKS is a bare submission unsubstantiated with cogent evidence in support thereof.

[27] The learned HCJ consequently held that Pali is a party that has contracted with JEKS as its main contractor and is liable to make payment to JEKS by virtue of the adjudication decision in the adjudication proceedings between JEKS and Pali. Additionally, JEKS has contracted with Bond and is liable to make payment to Bond by virtue of the adjudication decision. It is therefore plain that for purposes of s 30 of the CIPAA, Pali is the principal within the meaning of s 4 of the CIPAA and there is hence the adjudicated amount is payable by Pali to JEKS at the time when Pali received the notice of direct payment.

[28] The learned HCJ however held that the phrase 'adjudicated amount' in s 30(1) and (3) of the CIPAA does not include interest and costs. The learned HCJ found that since the phrases 'adjudication decision', 'adjudicated amount', 'interest' and 'costs' are used differently throughout the statute, namely ss 12(5), 18(1), 25(o), and 28(2) of the CIPAA, the legislature must have intended for those phrases to be construed in isolation and refer to

different matters. Reliance was made on the case of *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1 (FC) which decided that ‘When different words are used by the legislator in a statute, those different words in the statute are intended by the legislature to refer to different matters’.

[29] The learned HCJ’s finding was also premised on Her Ladyship’s reliance on the cases of *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2019] MLJU 1215; [2020] 1 CLJ 75 (CA) and *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 1 LNS 187 in that if interest and costs are intended to be included within the meaning of the phrase ‘adjudicated amount’ in s 30(1) and (3) of the CIPAA, express words to that effect would have been inserted therein as ‘interest’ and ‘costs’ are separately used in the other parts of the CIPAA.

FINDINGS OF THIS COURT

[30] As alluded to by us earlier, Appeal 314 is an appeal lodged by Pali against the judgment which ordered Pali to make direct payment to Bond under s 30 of the CIPAA whereas Appeal 399 is an appeal lodged by Bond against the judgment which excludes interest and costs in the s 30 of the CIPAA adjudicated amount that must be paid by Pali to Bond directly under s 30 of the CIPAA.

[31] Before us in both their written submissions and oral arguments, the parties repeated their contentions made in the High Court.

[32] It is hence apposite for us to reproduce s 30 of the CIPAA with emphasis added:

30 Direct Payment from Principal

- (1) If a party against whom an adjudication decision was made fails to make payment of the *adjudicated amount*, the party who obtained the adjudication decision in his favour may make a written request for payment of the *adjudicated amount* direct from the principal of the party against whom the adjudication decision is made.
- (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.
- (3) In the absence of proof of payment requested under subsection (2), the principal shall pay the *adjudicated amount* to the party who obtained the adjudication decision in his favour.

- A (4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.
- B (5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

Appeal 314

- C [33] In Appeal 314, Pali focussed its submission that Bond failed to prove that JEKS has failed to make payment of the adjudicated amount to Bond prior to Bond making its written request for payment of the adjudicated amount directly from Pali. Moreover, Pali also submitted that the learned HCJ had erroneously allowed Bond's application that was wrongly based on the adjudication decision between Pali and JEKS when it should have been based on the construction contract between Pali and JEKS.
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- E [34] Bond in retort counter-contended that it had fully complied with the provisions in s 30 of the CIPAA and should hence be paid directly by Pali as correctly decided by the learned HCJ.

- F [35] After hearing submissions by both parties, we are of the view that there is no necessity for the unpaid party Bond to provide affirmative evidence that Bond has not been paid by JEKS. Based on s 30(1) and (2) of the CIPAA read together as a whole, we construe that this non-payment is presumed and Bond only has to assert the same in the notice of direct payment. The onus is accordingly shifted to Pali to enquire from JEKS whether Bond has been paid. Since Pali has failed to do so, we conclude that Bond has not been paid by JEKS following *PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* (see also *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347; [2020] 5 AMR 757).
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- H [36] We are also satisfied from the evidence adduced that there were monies due or payable by Pali to JEKS at the material time based on the adjudication decision in the adjudication proceeding between JEKS and Pali. Hence the adjudicated amount in the adjudicated decision must be paid directly by Pali to Bond as principal pursuant to s 30 of the CIPAA.

- I [37] Thus, we do not find any appealable error in the findings of the learned HCJ that would warrant appellate intervention.

Appeal 399

- [38] In Appeal 399, Bond primarily contended that the phrase 'adjudicated

amount' in s 30 of the CIPAA should be liberally construed to include interest and costs to protect and/or safeguard the payment rights of the small contractors and/or subcontractors. This is consistent with the purpose of the CIPAA statute to facilitate regular and timely payment and provide remedies for recovery of payment.

A

B

[39] However, Pali counter-contended that the learned HCJ is correct in deciding that the phrase 'adjudicated amount' excluded interest and costs because if the legislature intended for 'adjudicated amount' to encompass interest and costs, this would have been expressly provided for in s 30(3) as well as s 28(1) and 28(2) of the CIPAA. Instead, the usage of 'adjudicated amount', 'costs', and 'interest' appear in different ss 12(5), 18(1), 25(o), 28(2) and 30 of the CIPAA meant that they refer to different matters.

C

[40] It is also apposite at this juncture to reproduce the following other relevant provisions in the CIPAA with emphasis added:

D

12 Adjudication and decision

(5) The adjudication decision shall also determine the *adjudicated amount* and the time and manner the *adjudicated amount* is payable.

E

18 Costs of adjudication proceedings

(1) The adjudicator, in making the adjudication decision in relation to *costs* of the adjudication proceedings shall order the *costs* to follow the event and shall fix the quantum of costs to be paid.

F

25 Powers of the adjudicator

The adjudicator shall have the powers to —

...

(o) award financing *costs* and *interest* and...

G

28 Enforcement of adjudication decision as judgment

(2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of *interest* on the *adjudicated amount* payable.

H

[41] We have accordingly in the exercise of our appellate function reviewed the judgment of the learned HCJ. After detail deliberation, we find that the learned HCJ has erred in construing the phrase 'adjudicated amount' in s 30 of the CIPAA to exclude 'interest' and 'costs' and are of the view that a proper construction of 'adjudicated amount' in s 30 of the CIPAA would include both and interest and costs too aside from the principal claim sum awarded.

I

[42] First and foremost, we find that the learned HCJ made an erroneous

A reliance on the case of *CT Indah Construction* because it was not the case on whether the phrase ‘adjudicated amount’ in s 30 of CIPAA includes or excludes interest and costs.

B [43] We further noted that the phrase ‘adjudicated amount’ has not been defined in s 4 of the CIPAA. As such, we are required to interpret and provide a reasonable meaning to it. For this purpose, we are guided by the case of *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561 (FC) wherein Vernon Ong Lam Kiat FCJ held as follows with emphasis added:

Statutory Interpretation

D [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute, an effect must be given to the object and intent of the Legislature in enacting the statute.* Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and giving effect to the words used by it. *The court will not read words into a statute unless clear reason for it is to be found in the statute itself.* Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. *Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain, and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning.* It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court ‘to travel outside them on a voyage of discovery are strictly limited’. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment.* This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. *An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective.* As such, *in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted.* It follows that *a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.*

I [44] It is plain from *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* that the Federal Court ruled in the circumstances where a word and/or phrase used in the statute is

unclear or ambiguous, such word or phrase will be construed in the light of the purpose and object of the statute. It is the prime consideration in that scenario. This is in consonance with s 17A of the Interpretation Act 1948 and 1967 which requires the courts to interpret the statute that would fulfil the purpose or object of the statute. The provision in s 17A reads as follows:

17A Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, *a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.*

[45] The purpose and object of the CIPAA have been recognised by the case of *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299 (FC), wherein Idrus Harun FCJ as follows with emphasis added:

[23] By way of emphasis, we would say with respect that there are errors in the High Court's interpretation of the CIPAA in *UDA Holdings Bhd*. To highlight such errors *we would start off by giving our focus on Parliament's intention in enacting the CIPAA*. The High Court's findings in *UDA Holdings Bhd* on this point can be summarised as follows:

- (a) *the CIPAA was enacted to ease cash flow problems in the construction industry by facilitating regular and timely payment, providing speedy payment dispute resolution through adjudication which is also about payment or providing remedies for the recovery of payment in the construction;*
- (b) *the objective of CIPAA was to offer a simple, fast and cheap mechanism for resolving payment problems and payment disputes faced in the construction industry as opposed to the existing dispute resolution through arbitration or the courts; and*
- (c) *the CIPAA was intended to remedy an existing problem in the construction industry*

[24] From the above, *the third finding made by the High Court in examining Parliament's intention that the CIPAA was intended to remedy an existing problem is important. This problem relates to the problem over payments experienced by the construction industry which is either there is non-payment, late payment or insufficient payment...*

[46] Furthermore, it is important to note that the CIPAA is meant to protect and/or safeguard the rights of the small contractors and/or subcontractors as seen in the case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] 1 LNS 1522 (CA), wherein David Wong Dak Wah JCA (later CJ of Sabah and Sarawak) held as follows with emphasis added:

A [15] The philosophy is simply this. *Prior to the introduction of CIPAA 2012, claims by subcontractors against the main contractors were not able to be resolved in a speedy and economical manner.* The only redress was to launch a suit in court and then apply for summary judgments with the hope that the courts would grant such summary judgments. Such applications invariably have difficulties as the threshold for such application to succeed is quite high as the subcontractor has to show that there are no triable issues for the court to adjudicate or in short the defence of the contractor has no merit at all. *It cannot be disputed that this sort of litigation has given rise to financial hardship to the subcontractors so much so that some had lost all the benefits of the subcontracts.* It also cannot be disputed that the contractors have taken advantage of the intricacies of the judicial system by withholding payments without valid reasons.

D [16] *To overcome the aforesaid shortcomings and with the aim of making the construction industry a fair playing field for the players, Parliament in various Commonwealth countries saw it fit to introduce an adjudication regime in which interim claims made by subcontractors can be dealt with by appointed adjudicators in a speedy and economical manner.* The benefit of such regime is plain and obvious in that *claims of subcontractors, being the lifeline of their survival, must not be delayed without valid reasons by the contractors.* In short, *the unnecessary stoppage of money flow would be avoided.*

E [17] In the context of our jurisdiction, *CIPAA 2012 was enacted and from s 12 we can discern features such as a specific time frame of 90 days for the adjudicator to decide on the dispute between the subcontractor and contractor* with the specific provision that any decision reached after the aforesaid period is deemed void and the non-applicability of the Evidence Act which *evoke the intentions of the Parliament to ensure claims of the subcontractors are dealt with within a reasonable time frame.*

[47] These findings in both aforementioned cases are fortified by the Second and Third Readings of the Construction Industry Payment and Adjudication Bill 2011 ('Bill') on 2 April 2012 as follows with emphasis added:

G Dato' Ismail Kasim [Arau]: ... Selari dengan itu apabila akta ini dibuat kita melihat banyak perkara yang menjadi masalah sekarang seperti projek terbengkalai, projek-projek serangan kulat seperti yang berlaku di bangunan SPRM di Melaka, kemudian bangunan-bangunan yang dihasilkan dalam keadaan yang kurang berkualiti. Begitu juga ada bangunan yang sehingga sekarang sekolah misalnya tidak selamat diduduki walaupun beberapa cara dan masalah telah dibuat.

H Jadi di antara punca yang berlaku keadaan-keadaan seumpama ini adalah disebabkan oleh soal kekurangan modal pusingan atau aliran tunai yang perlu ada kepada setiap syarikat pembinaan yang terlibat dalam industry ini. *Justeru kerana itu saya menyedari bahawa kerajaan telah menyedari hakikat ini apabila berlaku pertikaian soal antara main contractor dengan izin, dengan subcontractor dan sebagainya dan sub, sub yang berlaku.*

I Jadi di sini berlaku *apabila pihak yang kedua atau ketiga kadang-kadang mereka tidak dapat mengadu ataupun membuat satu aduan kepada mana-mana tempat yang mereka boleh dapat balik payment supaya mereka dapat melakukan kerja-kerja*

- berkenaan dengan lebih lancar apabila mereka mempunyai aliran tunai yang kukuh. Saya memuji pihak kementerian apabila ada cadangan. ...* A
- Tuan M Manogaran [Telok Intan]: ... Seterusnya, *selepas sesuatu projek itu selesai, mangsa yang sebenarnya adalah bukan sahaja sub-con tetapi sub-sub con dan downstream industries players* dengan izin termasuk pekerja-pekerja yang mungkin tidak dapat pembayaran atau gaji mereka atau apa-apa pembayaran professional mereka, dan ini kita telah banyak tengok pada amalan yang ada sekarang, kadang-kadang sesuatu projek yang telah disiapkan apabila main con tidak bayar, mereka pergi ke mahkamah dan main con memberi satu dengan izin ultimatum, *take it or leave it*, dengan apa-apa jumlah yang mereka fikir sesuai dan adil dan patut. Akan tetapi kerja telah dibuat dan telah selesai dan pengusaha-pengusaha kecil ini terbiar dengan begitu sahaja. B
- Mereka tidak dapat melawan kontraktor-kontraktor yang besar ini walaupun di mahkamah ataupun di PTSKL di mana PTSKL kadang-kadang memerlukan pembayaran yang tinggi untuk yuran adjudicator atau arbitrator dengan izin. C
- Jadi Kementerian harus memberi satu ruang atau peluang kepada pengusaha-pengusaha kecil ataupun dalam industri pembinaan ini — *the small contractors ...* D
- [48] These findings are likewise fortified during the Second and Third Readings of the Bill on 7 May 2012 as follows with emphasis added: E
- Timbalan Menteri Kerja Raya [Dato' Yong Khoo Seng]: ... Justeru, inisiatif pelaksanaan undang-undang berkaitan dengan pembayaran adjudikasi ini merupakan satu daripada agenda transformasi kerajaan bagi merealisasikan aspirasi tersebut. Dengan adanya Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011, masalah pembayaran dalam sektor pembinaan yang meliputi masalah ketidakbayaran, kelewatan pembayaran dan ketidakcukupan pembayaran dapat ditangani. Tidak dapat dinafikan juga bahawa ia menyediakan ruang bagi menyelesaikan masalah berkaitan pembayaran di pihak kontraktor khususnya kontraktor-kontraktor kecil. F
- ...
- Datuk Chin Su Phin: ... Saya ingin mengetengahkan isu sub kontraktor dahulu. Kita sedar bahawa sub kontraktor ini memainkan peranan yang sangat penting dalam menjayakan sesebuah projek. Cabaran yang paling utama dihadapi mereka ialah aliran tunai dan kelewatan mendapat bayaran daripada main contractor. Kita semua sedar bahawa tiada alasan untuk main con lambat membuat pembayaran kerana salah satu pemilihan kontraktor untuk sesebuah projek adalah kekuatan kewangan kontraktor. G
- [49] In the absence of definition of the phrase 'adjudicated amount' in CIPAA, we therefore find on our purposive construction or interpretation that it includes interest and costs in furtherance of the purpose and object of the H I

A statute to protect and/or safeguard the rights particularly of the small contractors and/or subcontractors. The phrase ‘adjudicated amount’ shall be interpreted in the light of that spirit.

B [50] We are mindful that the learned HCJ traversed the other ss 12(5), 18(1), 25(o) and 28(2) of the CIPAA but upon our review, we do not find that they stood in contradiction of the phrase ‘adjudication amount’ to include interest and costs. They must be read in context. In particular, we find that nothing in s 12(5) of the CIPAA prohibits the adjudicated amount to include interest and costs even though the adjudicator is specifically empowered to award interest in s 25(o) of the CIPAA and costs in s 18 of the CIPAA respectively. We further find that by virtue of s 28(2) of the CIPAA, the High Court is also empowered discretionarily to award interest on the adjudicated amount, say when the adjudicator unreasonably omitted to award interest on the principal claim sum.

D [51] That notwithstanding, we find that if the phrase ‘adjudicated amount’ did not include interest and costs, then the unpaid bond would in the factual circumstances here necessarily have to seek recovery twice, once against Pali for the principal claim sum awarded and then again against JEKS separately for interest and costs only. This cannot in our view be contemplated by the Legislature.

E [52] In the premises, we find the learned HCJ erred by excluding interest and costs from ‘adjudicated amount’ in s 30 of the CIPAA which warranted our appellate intervention.

CONCLUSION

F [53] It is for the foregoing reasons that we dismissed Appeal 314 and allowed Appeal 399 accordingly as so ordered.

Order accordingly.

H Reported by Ashok Kumar

I